MR. AND MRS. LEO McPHERSON, MARK McPHERSON, AND THOMAS CONNOR Appellants	:	BEFORE THE
	:	HOWARD COUNTY
vs.	:	BOARD OF APPEALS
DEPARTMENT OF PLANNING AND ZONING, HOWARD COUNTY, MARYLAND and RONALD WILDMAN Appellees	:	HEARING EXAMINER
	:	BA Case No. 601-D

::.

DECISION AND ORDER

On September 4, 2007, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, conducted a hearing on the administrative appeal of Mr. and Mrs. Leo McPherson, Mark McPherson, and Thomas Connor (the "Appellants"). The Appellants are appealing a May 18, 2007 letter to Ronald Wildman, Wharff Overlook, LLC, from the Howard County Department of Planning and Zoning ("DPZ"), advising him of the Subdivision Review Committee's determination that the three-lot, final subdivision plan for F 07-115 (the "Wortman property"), was technically complete. The Appellants allege DPZ's completeness determination is in error and contrary to law because the plan shows no structures on Parcel 634, yet that parcel is the subject of ongoing development plans.

The Appellants certified that notice of the hearing was advertised and that adjoining property owners were notified as required by the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

The Appellants were represented by Katherine Taylor, Esquire. Paul Johnson, Deputy County Solicitor, represented DPZ. Thomas M. Meacham, Esquire, represented Ronald

Wildman, Wharff Overlook, LLC.

After the Appellants introduced four exhibits without oral argument, DPZ moved for dismissal of the case. Upon consideration of DPZ's motion, the evidence before me, and for the reasons stated below, I determined to grant the motion and dismiss the case.

Background

Ronald Wildman, Wharff Overlook, LLC (the "Owner"), is the owner of Parcel 634, which is located in Ellicott City, Maryland. That parcel and Parcels 315 and 148 are part of a real estate transaction involving the reconfiguration of these properties to create Lots 1, 2, and 3. The parcels lie on the north and south side of Wharff Lane, where that lane terminates at Bonnie Branch Road. The Appellants are owners of adjacent property.

In accordance with the Howard County Subdivision and Land Development Regulations (the "Regulations"), the Owner submitted to DPZ a final minor subdivision plan (F 07-115). DPZ processed the plan, submitted comments to the Owner and the Owner submitted a revised plan[1] on April 5, 2007 (the "Owner's Plan") (Appellants' Exhibits 3-A and D). A note on the Owner's Plan states the purpose of the plan: "[t]o resubdivide Parcels 634, 315, and 148 for a real estate transaction. No improvements are being proposed at this time. The purpose of this resubdivision is to provide road frontage on Parcel 315 and provide parcel 148 with a more conforming lot layout."

By letter dated May 18, 2007, DPZ notified the Owner of DPZ's Subdivision Review Committee's determination that F 07-115 was technically complete, subject to compliance with

[1] A minor subdivision plan is technically a "final plat" within the meaning of the Regulations. For consistency, however, such plats are herein referred to as "plans."

certain agency comments/corrections and resolution of the Howard Soil Conservation District's concerns within two weeks.

On June 14, 2007, the Appellants filed an administrative appeal of DPZ's letter, stating 12 grounds.

1. Parcel 634 (Proposed Lot 3) shows no structures, yet is the subject of ongoing development, originally a Site Development Plan, and now a Conditional Use Plan (BA 07-011C).

2. There was no pre-submission meeting held for this plan despite County regulations requiring a pre-submission meeting to be held prior to a subdivision plan for residential development.

3. Generally regarding F 07-115, F 07-115 does not conform to the following Regulations:

   a. Section 16.116. Protection of Wetlands, Streams, and Steep Slopes
   b. Section 16.117. Forest Conservation and Preservation of Natural Cover
   c. Section 16.119. Highways, Streets & Roads
   d. Section 16.123(3) – "minimum disturbance necessary to accommodate the proposed development"
   e. Section 16.124(a)(1)(vi)—(Landscaping) … "prevent damage to and unnecessary removal of vegetation"
   f. Section 16.132(1)(i)—Road Construction

4. Note 11 of the Supplemental Plan incorrectly states the project is exempt from stormwater management.

5. Note 4 in the May 18, 2007 letter fails to state Parcel 326 has a private well and septic system.

6. Note 6 in the May 18, 2007 letter incorrectly notes the 10-foot right-of-way ("ROW") as a County Road.

7. Note 7 in the May 18, 2007 letter concerns an easement on Parcel 326, which the owners do not wish to grant.

8. Parcel 148's layout does not conform with Section 16.120(b)(4)—Lot Layout/useable Design Standards, and the BRL for Lot 2 is incorrect.

9. The F-04-087 floodplain study is seriously flawed.

10. Note 18 of the Supplemental Plan incorrectly states there are no wetlands.

11. The plan fails to show the property being subdivided is located in an environmentally sensitive area.

12. Lot 3's road dedication is questionable as retaining walls are not permitted in ROWs and the walls involve steep slopes and mature forests.

DPZ's Motion to Dismiss

The Appellants' case-in-chief consisted of 4 exhibits from the F 07-115 file. Having introduced these exhibits without laying a foundation about their relevance to the appeal, the Appellants stated that DPZ's errors about the plan's technical completeness would be pointed out in their closing argument and in their cross-examination of DPZ's witnesses. In their view, the evidence relevant to their appeal was in the file. The four exhibits are as follows:

- *Exhibit 1.* Excerpts from the Regulations, portions of which were highlighted, including Section 16.108 Definitions; Article II. Design Standards; Section 16.114 General; Section 16.115. Floodplain Preservation; Section 16.116. Protection of Wetlands, Streams, and Steep Slopes; Section 16.117. Forest Conservation and Preservation of Natural Cover; Section 16.120 Highways, Streets, and Roads, and; Section 16.120. Lot layout.

- *Exhibit 2.* F 07-115 Plan section blowup showing area to be dedicated to Howard County for a public road.
- *Exhibit 3A-F.* Six plans represented as being from the F 07-115. (Plans 3-A and 3-D are the subject of this appeal.)

  3-A: F 07-115 Wortman Property Revised Supplemental Plan, dated April 5, 2007

  3-B: F 07-115 Wortman Property Supplemental Plan, dated January 7, 2007

  3-C: BA 07-011C Wharff Overlook Conditional Use Plan, dated March 2007

  3-D: F 07-115 Wortman Property Revised Plan, dated April 5, 2007 (the "Owner's Plan")

  3-E: F 07-115 Wortman Property Plan, dated January 2007

  3-F: F 04-087 Brandon Woods Plan, dated March 2004
- *Exhibit 4.* Written and graphic documents represented as being from the F 07-115 file.[2]

DPZ bases its motion to dismiss on the ground that the Appellants did not meet their burden of proving by substantial evidence that DPZ's F 07-115 technically complete determination was clearly erroneous or arbitrary and capricious, or contrary to law. Addressing the Appellant's first claim, DPZ argues the Appellant made no showing that DPZ acted incorrectly and asserts that F 07-115 was processed consistent with the applicant's stated purpose, to resubdivide/reconfigure the lot lines of Parcels 315, 148, and 634 for a real estate transaction, that the applicable Regulations were addressed and followed, and that other regulations would be addressed at a later stage. Regarding the Appellants' remaining claims, DPZ asserts it does not review a plan involving the reconfiguration of existing lots in the same

[2] I admitted these documents for the limited purpose of their being from the file.

way it would treat the subdivision of one lot into three lots.

The Owner's reasoning resonates with DPZ's. In the Owner's view, the Appellants are attempting to compel DPZ to require more information than is required for a completeness determination.

Responding to DPZ's motion to dismiss the Appellants maintain: (1) the plan is a development plan because the ROW dedication is a physical alteration triggering certain requirements that DPZ did not require; (2) the Owner made errors in the plan which were not corrected, and; (3) DPZ's action in approving Lot 148, which Appellants contend is a non-conforming non-usable lot, is arbitrary and capricious.

Discussion

Section 16.105 of the Howard County Code allows any person aggrieved by a DPZ decision to appeal that decision to the Board of Appeals within 30 days. Section 16.301(b) authorizes the Board to hear such appeals "where it is alleged there is error in any order, requirement, decision, or determination made by any administrative official in the application, interpretation, or enforcement of this title or of any regulations adopted pursuant to it." When an administrative agency decision is challenged, Hearing Examiner Rule 10.2(c) requires the petitioner ". . . to show by substantial evidence that the action taken by the administrative agency was clearly erroneous, arbitrary and capricious, or contrary to law." Moreover, an administrative agency's interpretation and application of a statute that the agency administers should ordinarily be given considerable weight by reviewing courts. *Board of Physician Quality Assur. v. Banks*, 354 Md. 59, 69 (1999). Accordingly, it is the Appellants' burden to prove through an adequate, sufficient, and relevant evidentiary base that DPZ's decision was not consistent with law or

policy, or previous agency decisions, or that DPZ otherwise made a mistake or acted improperly when it determined the plan was technically complete.

The dispute in this case concerns DPZ's processing and review of the Owner's Plan through Subtitle I, the Howard County Subdivision and Land Development Regulations, as a minor subdivision plan involving only certain lot reconfigurations and a ROW dedication. The claims set forth in the administrative appeal petition generally contend the Regulations required the Owner's Plan to comply with, and DPZ to process that plan as, alternatively, a minor subdivision proposing certain changes in physical site conditions, a minor subdivision plan for residential development or, with respect, apparently, only to Parcel 634 (Lot 3), as a major development.

Section 16.108(b)(60) defines "subdivision" as any division "of a lot or parcel of land into lots or parcels for the immediate or future transfer of ownership, sale, lease, or building development. The term includes lot mergers and resubdivision and, when appropriate to the context, shall relate to the process of subdivision or to the land subdivided." Section 16.108(b)(32) defines a minor subdivision plan as one proposing to "divi[de] a residential or agricultural parcel that has not been part of a previously recorded subdivision, into 4 or fewer residential lots, (including buildable preservation parcels but excluding open space and non-buildable preservation parcels), either all at one time or lot by lot."

Section 16.102(c)(1) exempts minor subdivision plans that do not involve public road improvements from the sketch plan and preliminary plan procedures of Subtitle I, and allows them to proceed at the final plan stage. Final minor subdivision plan requirements are set forth in Section 16.147, which obliges the developer of an "initial plan for residential submittal for a

residential infill subdivision" to hold a pre-submission community meeting in accordance with Section 16.127 (Residential Infill Development).

Read together, this language makes clear that the submission to DPZ of a minor subdivision plan for a parcel or parcels of land into 4 or fewer lots may have two different purposes: (1) parcel subdivision for the creation of lots for immediate or future transfer of ownership, sale, lease, or (2) parcel subdivision for development. That these are two different actions triggering different technical plan requirements is borne out by other provisions of the Regulations. A minor subdivision residential infill subdivision plan may trigger DPZ's review under the technical requirements for building development, as may a minor subdivision plan involving public road improvements.

So may minor subdivision plans involving certain changes in existing site conditions, as the Appellant' point out through Exhibit 1, which directs us to the Regulations' definition of "development."

> The establishment of a principal use on a site; a change in a principal use of a site; or the improvement or alteration of a site by the construction, enlargement, or relocation of a structure*; the provision of storm water management or roads; the grading of existing topography; the clearing or grubbing of existing vegetation; or any other non-farming activity that results in a change in existing site conditions* (Appellants' emphasis added).

Applying this definition, a minor subdivision plan involving site improvement or alteration by the construction, enlargement, or relocation of a structure, the provision of stormwater management, grading, vegetation clearing, or any other change in existing site conditions may also trigger a different level of review for compliance with the applicable requirements. On the other hand, absent the proposal of any such development or changes in site conditions, a final

subdivision plan submitted for the limited purpose of reconfiguring parcel lot lines and dedicating a ROW for the immediate or future transfer of ownership would not be required to comply with all the final plan requirements of Section 16.147(c).

In this case, as to the twelve claims made, I find the Appellants have not met their evidentiary burden of showing by relevant and adequate evidence that DPZ's technically complete determination was improper and contrary to law or that the Owner's minor subdivision plan is legally insufficient. The evidence does not show DPZ error in failing to process and review the plan as a minor subdivision residential infill subdivision plan, a minor subdivision plan involving public road improvements, or a minor subdivision plan involving certain changes in existing site conditions. Nor does this evidence show DPZ acted contrary to law, erred, was otherwise mistaken, or departed from agency policy when it made its technically complete determination without considering a plan for a conditional use involving Parcel 634, which has the Hearing Authority has yet to hear.

With respect to claim 1, the Appellants generally aver F 07-115's purpose is to gain otherwise unrestricted access to Wharff Lane for Parcel 634 to provide unrestricted frontage through road dedication for Parcel 634 (Proposed Lot 3) for the purpose of developing "Wharff Overlook," a proposed Conditional Use Plan (BA 07-011C) to be considered by the Hearing Authority at a future hearing. But the minor subdivision plan the Owner submitted to DPZ for processing, and the final subdivision plan DPZ found was technically complete, was for the resubdivisions of Parcel 634, 315, and 148, showing a ROW dedication, and making Parcel 148 more conforming (Appellants' Exhibit 3-D). Claim 1 is dismissed.

With respect to claim 2, I find the Appellants have not met their evidentiary burden of

showing by relevant and adequate evidence that DPZ's technically complete determination was improper or that the Owner failed to comply with the Regulations by not holding a pre-submission community meeting pursuant to Section 16.147 or Section 16.127. Absent any evidence that the Owner was proposing a subdivision plan for residential infill development, this claim is dismissed.

With respect to claim 3, concerning F 07-115's alleged failure to conform to several technical plan requirements, I find the Appellants have not shown that DPZ or Owner acted contrary to law. Indeed, despite Appellants' belief that DPZ should have required such information, or that the Owner failed to provide this information, the Appellants produced no evidence demonstrating how the Owner's plan proposed any physical change in site conditions or any development activity to trigger compliance with Sections 16.116, 16.117, 16.119, 16.123(3), 16.124(a)(1)(vi), or Section 16.132(1)(i). This claim is dismissed.

With respect to claim 4, which avers the Supplemental Plan incorrectly states the project is exempt from stormwater management, the petition maintains the Plan is not exempt because improvements are being proposed, including a major development (BA 07-011C) and proposed road improvements. I find here the Appellants have not proposed any development or changes in site conditions within the meaning of the Regulations. Because the Appellants fail to show by substantial evidence DPZ or Owner error or mistake, this claim is dismissed.

Claim 5 concerns a DPZ comment that the Owner verify with the Health Department whether the septic area must be shown on the plan because Note 15 on the Owner's Plan indicated that Lot 1 is on private well and septic. The petition asserts the plan should also state that adjoining Parcel 326 has a private well, septic system, and septic field because the ROW

shown on the plan will be altered to construct a proposed roadway, apparently for BA 07-011C. Because BA 07-011C is not the plan DPZ determined was technically complete, this claim is dismissed.

Claims 6 and 7 concern two matters over which I have no jurisdiction. Note 6 in DPZ's comments attached to the May 18, 2007 letter questions whether Lots 1 and 2 should continue to show 10-foot ingress/egress easements (prescriptive ROWs). The petition states these are private, not County ROWs which the County may not abandon. Claim 7 challenges DPZ's comment to correct Note 7 on the Owner's Plan to indicate the recordation of use-in-common maintenance agreements between Lot 1 and Lot 326 with the final plat in the Land Records. DPZ also notes that Lot 1's existing driveway may encroach on Parcel 325, requiring an easement or driveway relocation. Because these matters ultimately concern property boundary lines and title issues, I have no jurisdiction to review them and they are dismissed.

As to Claim 8, the Appellants contend DPZ acted improperly in making a technically complete determination because Parcel 148's layout does not conform with Section 16.120(b)(4)—Lot Layout/useable Design Standards, creating a non-useable, non-buildable lot with a ROW running through it in violation of the Zoning Regulations. However, Note 16 on the Owner's Plan indicates a house already exists on this lot and no changes are proposed that would trigger these requirements. Additionally, Section 16.102 permits DPZ to approve resubdivisions that do not accord with the minimum lot sizes of the Zoning Regulations if the resubdivision improves the compliance of the existing lots. Absent evidence that DPZ's technically complete determination regarding Parcel 148's layout was capricious or arbitrary, claim 8 is dismissed.

As to claim 9, which asserts F 07-115's floodplain limits are incorrect because the base study is seriously flawed for showing incorrect water flows, I find the Appellants have not met their burden of showing by substantial evidence that DPZ's decision was arbitrary or capricious or contrary to law. Nor did they offer evidentiary proof in support of this claim. This claim is dismissed.

As to claim 10, which alleges Note 18 of the Supplemental Plan incorrectly states there are no wetlands on the site because a perennial stream exists and is shown on Parcel 315, I find the Appellants have not met their burden of showing by substantial evidence that DPZ's decision was arbitrary or capriciously or contrary to law because they failed to offer evidentiary proof that wetlands exist. This claim is dismissed.

With respect to claim 11, the plan's alleged failure to show the property as located in an environmentally sensitive area, the petition refers us to a May 22, 2006 letter requiring a now voided plan to show a certain watershed on the forest stand. Absent any evidentiary showing that DPZ acted improperly in making the technically complete determination by failing to require the watershed to be shown for F -05-115, I must conclude the Appellants have not met their burden of proof on this matter and the claim is dismissed.

Finally, with respect to claim 12, wherein the petition states that Lot 3's public road dedication is questionable because a road would require retaining walls in a steep slope area, I find that no such walls are proposed because the plan proposed no roads, grading, or physical change in site conditions. Because DPZ could not have made an error when no such changes were proposed, this claim is dismissed.

ORDER

For the foregoing reasons, it is this **20th Day of September 2007**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the petition of appeal of Mr. And Mrs. Leo McPherson, Mark McPherson, and Thomas Connor in BOA Case No. 601-D is hereby **DISMISSED.**

HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER

Michele L. LeFaivre

Michele L. LeFaivre

Date Mailed: 9/21/07

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.